RAILROAD COMMISSION OF TEXAS
HEARINGS DIVISION

CONSOLIDATED
OIL & GAS DOCKET NOS. 8A-0278263 & 8A-0279792

APPLICATION OF THE GEORGE R. BROWN PARTNERSHIP, L.P., TO CONSIDER SURFACE COMMINGLING AUTHORITY PURSUANT TO S.W.R. 26 AND 27 FOR THE J.W. MORRISON LEASE, WELL NOS. 3, 4, & 5, LYN-KAY (6200) FIELD, KENT COUNTY, TEXAS
&
COMMISSION CALLED HEARING TO PROVIDE THE GEORGE R. BROWN PARTNERSHIP, L.P., AN OPPORTUNITY TO SHOW CAUSE WHY THEY ARE NOT IN BREACH OF SURFACE COMMINGLING AUTHORITY PURSUANT TO S.W.R. 26 AND 27 FOR THE J.W. MORRISON LEASE, WELL NOS. 3, 4, & 5, LYN-KAY (6200) FIELD, KENT COUNTY, TEXAS

HEARD BY: Laura E. Miles-Valdez - Legal Examiner
Andres Trevino, P.E. - Technical Examiner

REVIEWED BY: Richard Atkins, P.E. - Technical Examiner

PROCEDURAL HISTORY OF CASE:

Date Protest Filed:	September 5, 2012
Notice of Hearing sent:	September 17, 2012
Hearing Held:	February 14, 15, & 26, 2013
Final Transcript Received:	March 19, 2013
Closing Arguments Received:	April 1, 2013
PFD Issued:	November 22, 2013

APPEARANCES:	**REPRESENTING:**
FOR APPLICANT:	
David Jackson, Attorney	The George R. Brown Partnership, L.P.
Albert Libersat, General Manager	
Don Rhodes, Regulatory Consultant	
FOR PROTESTANTS:	
George C. Neale, Attorney	Whiting Oil and Gas Corporation
Jack Lowder, Patroleum Engineer	Whiting Oil and Gas Corporation
Robert C. Grable, Attorney	G.W. Brock
Michelle Brock, Landman	G.W. Brock

EXAMINERS' REPORT AND PROPOSAL FOR DECISION

STATEMENT OF THE CASE

On August 17, 2012, the George R. Brown Partnership, L.P., (Brown) filed an application for Exception to Statewide Rule (SWR) 26 (Form P-17), as well as a Request for Permission to Subdivide Oil Lease (Form P-6) for the J.W. Morrison Lease, Well Nos. 3 and 4, Lyn-Kay (6200) Field, Kent County, Texas. In filing the P-6, Brown stated the working interests in the lease were different in the two wells, due to two working interest owners deciding to non-consent in the completion of the J.W. Morrison, Well No. 3. On August 30, 2012, the Commission received a protest of Brown's P-17 filing from one of the non-consent working interest owners, Whiting Oil and Gas Corporation (Whiting). On September 5, 2012, the Commission received a second protest of Brown's P-17 filing from G.W. Brock (Brock), also a non-consent working interest owner.

On December 14, 2012, Brown filed amended P-6 and P-17 applications, adding the newly drilled Well No. 5. In the amended P-6 and P-17 filed Brown indicated **no** working interest ownership in Well No. 4 by Brock and Whiting; however, in Wells Nos. 3 and 5, Brock and Whiting were listed as having 10% and 25% working interest ownership (respectively) in the wells.

On December 27, 2012, the Commission consolidated Oil and Gas Docket No. 8A-0279792 (Commission Called Hearing to Provide the George R. Brown Partnership, L.P., an Opportunity to Show Cause Why They Are Not in Breach of Surface Commingling Authority Pursuant to SWR 26 and 27 for the J.W. Morrison Lease, Well Nos. 3, 4, and 5, Lyn-Kay (6200) Field, Kent County, Texas) into Oil and Gas Docket No. 8A-0278263 (Application of The George R. Brown Partnership, L.P., to Consider Surface Commingling Authority Pursuant to SWR 26 and 27 for the J.W. Morrison Lease, Well Nos. 3, 4, and 5, Lyn-Kay (6200) Field, Kent County, Texas).

On February 11, 2013, Brown filed a Motion to Dismiss all the hearings, and asserted the "provisions of Rules 26 and 27 are simply not applicable to consenting and non-consenting working interest owners in the same lease." On February 13, 2013, Brock and Whiting filed a Joint Response to Brown's Motion to Dismiss. At the beginning of the February 14, 2013 hearing, the parties argued their respective positions on the Motion to Dismiss, and the hearings examiners carried their ruling on the Motion to Dismiss with the case. During the February 14, 2013 hearing, the parties' case in chief was also presented. Mr. Jackson, appearing on behalf of Brown, presented Mr. Al Libersat, the General Manager of Operations for The George R. Brown Partnership and Mr. Don Rhodes, a regulatory consultant. On February 15, 2013, Mr. Neal, appearing on behalf of Whiting, and Mr. Grable, appearing on behalf of Brock, presented Protestants' witnesses, Ms. Michelle Brock, a landman and a 32-year employee of Brock and Mr. Jack Lowder, a petroleum engineer.

On February 25, 2013, the day before the hearings resumed, Brown amended its P-6 and P-17 for a second time. Brown's filed amendments were accompanied with a cover letter indicating Brown intended the filings of the P-6 and P-17 to be conditioned upon the Commission's ruling that a Rule 26 exception is required under the circumstances.

On February 26, 2013, the hearing proceedings continued with the Protestants' presentation of their case in chief. At the conclusion of that hearing, it was announced written Closing Arguments would be due approximately two weeks after receipt of the official transcript.

On March 19, 2013, Brock and Whiting jointly filed a Motion for Entry of an Interim Order and request for Oral Argument before the Commission. In their post-hearing motion, the Protestants sought an expedited issuance of a PFD on two issues : (1) Brown's Motion to Dismiss, and (2) Brown's Application for an Exception to SWR 26, conditioned upon and ordering the isolation of production from Well No. 4, pursuant to procedure set out by Whiting during the hearing in a Whiting Exhibit 15-R. Brown filed its response to Brock and Whiting's motion on April 1, 2013, asserting there was no legal authority for the entry of an interim order because there was no law which provides for the issuance of an interim order in this case. On April 11, 2013, Brock and Whiting filed their Reply to Brown's response, and asserted, among other arguments, that because the protection of correlative rights were at issue, an interim order was appropriate.

On June 27, 2013, the hearings examiners issued a letter ruling denying the Protestants' Motion for Entry of an Interim Order. On July 2, 2013, Protestants Brock and Whiting filed a joint appeal of the denial of their Motion for Entry of an Interim Order and Request for Oral Argument. On July 12, 2013, Brown filed its timely Response to the Protestants' appeal of the denial of their Motion for Entry of an Interim Order and Request for Oral Argument. On July 22, 2013, Protestants' filed Brock and Whiting's (1) Reply to Brown's Response, (2) Response to the Examiners' July 10, 2013 Memorandum and (3) Request for Oral Argument. The interim appeal was denied pursuant to 16 Tex. Admin. Code § 1.30, by operation of law.

APPLICABLE LAW

Statewide Rule 26(a)(2) provides that all oil and any other liquid hydrocarbons as and when produced shall be adequately measured before the same leave the lease from which they are produced. Sufficient tankage and separator capacity must be provided on a lease by the producer to adequately take daily gauges of all oil and any other liquid hydrocarbons. However, pursuant to Statewide Rule 26(b), in order to prevent waste, promote conservation, or protect correlative rights, the Commission may approve surface commingling into a single storage tank of oil, gas, or oil and gas production from two or more tracts of land producing from the same Commission designated reservoir or from one or more tracts of land producing from different Commission designated reservoirs.

Pursuant to Statewide Rule 26(b)(1), an application for surface commingling may be approved administratively if (a) the tracts or Commission designated reservoirs have identical working interest and royalty interests; or (b) production from each tract and each Commission designated reservoir is separately measured and therefore there is no commingling of separate interests. Administrative approval is also authorized when the tracts or Commission designated reservoirs do not have identical working interest and royalty interest ownership in identical

percentages and the Commission has not received a protest to an application within 21 days of notice of the application being mailed by the applicant to all working and royalty interest owners or, if publication is required, within 21 days of the date of last publication and the applicant provides a method of allocating production to ensure the protection of correlative rights and evidence that proper notice has been provided to the working and royalty interest owners.

Pursuant to Statewide Rule 26(b)(2), when the tracts or Commission designated reservoirs do not have identical working and royalty interest ownership in identical percentages and a person entitled to notice of the application has filed a protest, the applicant may request a hearing. In this circumstance, the Commission may permit commingling if the applicant demonstrates that the proposed commingling will protect the rights of all interest owners and will prevent waste, promote conservation or protect correlative rights. Pursuant to Statewide Rule 26(b)(3), the applicant must demonstrate that the proposed commingling will not harm correlative rights of the working or royalty interest owners of any of the wells to be commingled. The method of allocation of production to individual interests must accurately attribute to each interest its fair share of aggregated production.

DISCUSSION OF THE EVIDENCE

On February 14, 2013, a hearing was called to consider the Application of the George R. Brown Partnership, L.P., to Consider Surface Commingling Authority Pursuant to SWR 26 and 27 for the J.W. Morrison Lease, Well Nos. 3, 4, and 5, Lyn-Kay (6200) Field, Kent County, Texas, as well as the Commission called hearing to provide the George R. Brown Partnership, L.P., an Opportunity to Show Cause Why They Are Not in Breach of Surface Commingling Authority Pursuant to SWR 26 and 27 for the J.W. Morrison Lease, Well Nos. 3, 4, and 5, Lyn-Kay (6200) Field, Kent County, Texas. At issue before the examiners: (1) Brown's Motion to Dismiss seeking a determination of whether Brock and Whiting's complaint should be dismissed, and (2) whether Brown's SWR 26/27 application should be granted---with or without conditions.

During the February 14, 2013 hearing, the parties argued their respective positions on the Motion to Dismiss, and the hearings examiners carried their ruling on the Motion to Dismiss with the case. Additionally, during the February 14th hearing, the the parties' case in chief regarding the applicability of SWR 26/26 was also presented. Mr. Jackson, appearing on behalf of Brown, presented Mr. Al Libersat, the General Manager of Operations for the George R. Brown Partnership, and Mr. Don Rhodes, a regulatory consultant.

On February 15, 2013, Mr. Neal, appearing on behalf of Whiting, and Mr. Grable, appearing on behalf of Brock, presented Protestants's witnesses, Ms. Michelle Brock, a landman and a 32-year employee of Brock and Mr. Jack Lowder, a petroleum engineer.

On February 26, 2013, the hearing proceedings continued with Mr. Neal, appearing on behalf of Whiting, and Mr. Grable, appearing on behalf of Brock, presenting protestant's witnesses, Mr. Jack Lowder, a petroleum engineer. The hearings concluded with the Protestants continuing the

presentation of their case in chief, and written Closing Arguments were due approximately two weeks after receipt of the official transcript.

APPLICANT'S EVIDENCE

Motion to Dismiss

Brown's Motion to Dismiss seeks to dismiss Brock and Whiting's complaint, which alleges Brown is improperly commingling production from Wells Nos. 3 and 4 on the J.W. Morrison Lease, Lyn-Kay (6200) Field, Kent County, Texas, in violation of SWR 26. Brown's Motion to Dismiss also sought to dismiss its application for an exception to SWR 26 (Form P-17), as well as a Request for Permission to Subdivide Oil Lease (Form P-6) for the J.W. Morrison Lease, Well Nos. 3 and 4, Lyn-Kay (6200) Field, Kent County, Texas.

Mr. Jackson argued Brown's Motion for Dismissal. Brown asserts that Statewide Rule 26 does not apply to the J.W. Morrison Lease, Well Nos. 3 and 4 because Brown contends there are not two separate tracts. Brown argues because SWR 26 (b) states that "[i]n order to prevent waste, to promote conservation or to protect correlative rights, the commission may approve surface commingling of oil, gas, or oil and gas production from ***two or more tracts of land*** producing from the same commission-designated reservoir, . . . " there must be two separate tracts of land to qualify for a Rule 26 exception. Brown asserts their Rule 26 application should be dismissed since there are not two separate working interests, and therefore there is no need for a commingling exception.

Brown argues Brock and Whiting's decision to go non-consent in Well No. 4, as per the terms of the Joint Operating Agreement (JOA), did not create two separate tracts of land, nor did it create different working interests. Brown contends the decision to go non-consent by Brock and Whiting did not relinquish their status as working interest owners, it merely created an obligation for Brock and Whiting to pay their revenues to the Consent working interest owners during term of the payout period.[1] Brown, in labeling the JOA as a contract and not a conveyance instrument, also notes the JOA did not create separate interests which are to be recorded in the deed records of the county.

In arguing against its Rule 26 application, Brown asserts that it merely filed the Rule 26 application as a "placeholder" pending a ruling by the Commission as to whether or not Rule 26 applied.[2]

Brown's motion also seeks to dismiss Brock and Whiting's complaint which alleges improper commingling. Brown responded to Brock and Whiting's complaint and contends Rule 26 does not apply because there are not two separate tracts of land, and any other commingling

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[1] Vol. I, p. 38, l. 8-14.

[2] Vol. I, p. 41, l. 6.

complaints are to be handled in accordance with the provisions of the JOA, which is a contractual issue outside the jurisdiction of the Commission.

Merits - Rule 26/27 Exception

Testimony of Albert Libersat

Brown's testimony regarding the merits of the Rule 26 application began with Mr. Albert Libersat, the operations manager for the George R. Brown Partnership. Mr. Libersat testified generally about the history of the J. W. Morrison lease---including the history of Well Nos. 3, 4 and 5; the Joint Operating Agreement (JOA)---including the Non-Consent pay-out penalty provision; and how production from the lease's active wells is currently begin separated, allocated, and accounted for. Mr. Libersat went into detail regarding the specific mechanisms of separating and allocating oil production from Well Nos. 3 and 5. Specifically, Demonstrative Exhibit 2 was admitted to show an hypothetical case scenario based on a lease with two wells, in which allocation was split 15/30 between Consent and Non-Consent interest owners on one well and 30/15 split for well two. Mr. Libersat's Exhibit 2, demonstrated that well one and well two would pay out a theoretical $200,000 penalty, assuming constant 45-barrels per day, after 7 months and 13 months, respectively. Under both scenarios outlined, (assuming continued production) the non-consent interest owners would eventually succeed in paying out the non-consent penalty and then return to full working interest owner status.

Mr. Libersat's testimony continued with a discussion and evidence of the production history of Wells No. 3, 4, and 5. Specifically, Exhs. 5, 6, and 7, were admitted as graphic representations of the production on the lease; Exh. 5 depicted production from the entire J.W. Morrison lease from 1976 through to December 2012; Exh. 6 depicts production from Well No. 3; and Exh. 7 depicts production from Well No. 4.[3] In Mr. Libersat's opinion production from the lease has had no unusual down times and a few periods of increased production due to well stimulation via an acid job and Well No. 4 coming on-line.

Mr. Libersat then testified as to how the production from the lease was measured, separated, and stored. Mr. Libersat testified as to a schematic representation of the facilities at the J.W. Morrison lease during the period in which Well Nos. 3 and 4 were the only wells producing on the lease. (Exh. 8). The flow stream produced from the two separate wells could be put through the either the production header or the test header. Production sent through the production header is sent directly to the production separator which separates oil (sent then to an oil storage tank), water (sent to a water storage tank), and gas (used on the lease). Production sent through the test header goes through to the test separator which measures oil, gas, and water. This test header production is then recombined, put back through a production separator, where oil, gas, and water are separated out.

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[3] Exh. 7 reflects the allocated production attributed by Brown to the well since it was brought on-line from January through October of 2012. V. I, p. 79, ln. 8-11.

Then the oil is sent to the storage tank, water is sent to the water storage tank, and gas is used for the lease. The oil production for both the production header and tester header streams are measured in the oil storage tank. The facilities are set up to allow for rotation of testing of either Well No. 3 or 4, which could then verify and/or calibrate production going into the oil storage tank.

Testimony regarding how the production from the lease is currently measured, separated, and stored continued with a schematic representation of the facilities as they currently stand on the J.W. Morrison lease with Well Nos. 3, 4 and 5. (Exh. 9). The flow stream produced from the three wells is currently produced and tested through two test separators, a heater-treater, a water tank, and an oil tank. Currently there are two test separators, one test separator is dedicated to Well No.4, and the other test separator alternates between Well No.3 and No. 5.[4]

Mr. Libersat continued his testimony about production and how Brown allocates it between the Non-Consent and Consent owners. He explained Exhibit 10 sets out a summary of Brown's method of allocation for Well Nos. 3, 4, and 5, on the lease, during two periods--- first, showing allocated production for Well Nos. 3 and 4 and then Brown's current allocation for Well Nos. 3, 4, and 5. He further explained for the period prior to Well No.5 coming on-line, production from Well Nos. 3 and 4 was allocated using a deduction method of subtracting the test separator volume from the oil volume tank. Production from Well No. 3 or 4 was sent through the test separator, the production was measured at the test separator, and then depending on which well had been sent through the test separator, the other well was allocated production based on the total production measured at the oil storage tank. The example given was if the test separator reads 10 barrels of oil produced from one well and the oil storage tank has 20 barrels of oil, then 10 barrels of oil would be allocated to the other well not sent through the test separator. Once Well No.5 came on-line, Brown would take the two test separator volumes, subtract it from the total oil tank volume, and the remaining well not sent through a test separator would be allotted the remaining volume.

Mr. Libersat then discussed the weekly gauge reports for the lease, from January 2, 2012, to January 1, 2013. (Exh. 11). The weekly gauge report was documentation by a hired "pumper" who would go out to the lease and review and report on the lease's wells, tanks, and production volumes. The pumper would also record any activity of note on the lease, such as electrical outages which would cause the wells to shut down until the electricity came back on, or other such abnormal lease events. He pointed out instances in which a test meter was in error and had a disproportionate volume in relation to the total volume in the oil storage tank. In these circumstances, he would not use the test meter volume. Mr. Libersat's monthly calculated allocation for the Well Nos. 3 and 4 (and later on Well No. 5) were recorded into a spreadsheet. (Exh. 12). He noted volume from Well Nos. 3 and 4 were either received from the gauge report, the well test, or in the event only one well was producing, he would record the volume from that lone well. He believed the allocation method (the "deduct method") documented in Exhibit 12 was a fair and accurate allocation of production for Well Nos. 3 and 4, and later on Well No. 5.

In comparing his method of allocation to another method of allocation allowed by the Commission, Mr. Libersat, testified as to the use of W-10 tests for each well on the J.W. Morrison

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[4] V. I, p. 157, ln. 9-12.

lease as a source of data for allocation.[5] Mr. Libersat explained Exhibit 13 is the production data gathered and reported in W-10's, which represents reported volumes for each of the wells, and which can be used as a source of production volume data from which allocation for the lease can be derived. In explaining why the use of W-10's was not a better method of allocation, Mr. Libersat stated he believed more frequent and more recent measurements should be used in calculating allocation for the J.W. Morrison lease. (W-10's for the J.W. Morrison lease were taken and reported near annually as documented in Exh. 13.)

Discrepancies between test meter volumes and measured production volumes in the tanks were also detailed by Mr. Libersat. He stated such discrepancies were an expected occurrence and he accounted for such discrepancies by eliminating and not relying on "bad test" results. During the month of January 2012 when there were a large number of discrepancies, Mr. Libersat didn't rely on meter readings. He explained in January, whenever Well No. 3 was down, Well No. 4 was the only well producing, and *vice versa*; therefore, the erroneous meter readings weren't an issue in the January 2012 allocation. During other months, his usual method of determining allocation was a deduction method in which so long as the gauge reading was greater than the meter reading and both wells were producing the meter reading was honored and the difference between the two volumes was attributed to the well that was not on test.

In explaining Brown's reasoning behind their filing for a Rule 26 exception (Form P-17), Mr. Libersat asserted while they didn't believe they needed a commingling permit they decided to err on the side of caution in response to Brock and Whiting's objections (and the later-filed complaint filed with the Commission.)[6] As part of this decision to file for a commingling permit, Brown filed a Request for Permission to Subdivide Oil Lease (Form P-6), which separated out Well No.4 and the 40 acres surrounding it into a different tract/lease.[7] In filing the original August 17, 2012, P-6, Mr. Libersat stated the request was made because "the working interest in this lease is different in the two current wellbores due to some working interest owners deciding to go non-consent in the completion of the J.W. Morrison Well No. 4. The royalty interest in both wells remain the same."[8] Brown made the same statement when it filed and amended its P-6 and P-17 filings after Well No.

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[5] 16 T.A.C. §3.26(b)(3)(A) provides for the use of "allocation based on the daily production rate for each well as determined and reported to the Commission by semi-annual well tests (i.e. W-10's) will accurately attribute to each interest its fair share of production without harm to correlative rights."

[6] Oil & Gas Docket No. 8A-0279792; Commission Called Hearing to Provide the George R. Brown Partnership, L.P., an Opportunity to Show Cause Why They Are Not in Breach of Surface Commingling Authority Pursuant to SWR 26 and 27 for the J.W. Morrison Lease, Well Nos. 3, 4, & 5, Lyn-Kay (6200) Field, Kent County, Texas.

[7] Exh. 14.

[8] Exh. 14.

5 came on-line.[9] Brown in its future filings (i.e., the amended P-6 filed 12/12/12) indicated the new lease containing Well No. 4 was the Morrison "A", J.W. Lease. (*See* Exh. 16 p. 2). Brown indicated that it was unaware that the original August 17, 2012, P-6 was approved by the Commission until the day before the hearing (i.e., on 2/13/13). Further, Mr. Libersat confirmed the Commission had assigned a new lease number for the Morrison "A", J.W., which solely contained Well No. 4, as 69907.[10] The new lease was assigned after the initial P-6 and P-17 were filed and was back-dated to be effective 2/1/2012.[11]

Nonetheless, when asked by opposing counsel about filling the P-6 requests Mr. Libersat stated in his opinion, there is no difference in working interests ownership in Well No. 3 and Well No. 4 on the J.W. Morrison lease. He also explained according to his general understanding of working interest obligations, a working interest owner bears a percentage of costs in operations, depending on the circumstances. According to his understanding, Mr. Libersat testified as to the current status of the costs assessed to Brock and Whiting for Well Nos. 3, 4, and 5. Mr. Libersat confirmed Mr. Brock's cost interest for Well Nos. 3 and 5 is 10 %, and that Mr. Brock is currently not paying any costs on Well No. 4. He confirmed since Brock and Whiting went non-consent on Well No. 4, neither Brock nor Whiting has been billed any costs for the well, and the net revenue interest attributable to the Brock and Whiting working interests has not been paid to them. Mr. Libersat explained that with regard to Well No. 4, while Brock and Whiting are not billed for costs and did not receive revenue, they still have a 25% and 10%, respectively, working interest in the well.

On cross-examination, Mr. Libersat stated if the royalty interests on a lease are different, then a Rule 26 exception would be necessary. Further, under his understanding of Rule 26, if either the working interest or the royalty interest is different among owners, then a Rule 26 exception would be required. Mr. Libersat also conceded if the Commission finds that the effect of the relinquishment of the non-consent parties' leasehold working and the production interests in Well No. 4, is effectively an assignment of their interests in Well No. 4, then a Rule 26 exception would be required.

Mr. Libersat was also asked about the decline curve spreadsheet he created, which indicated Well No. 3's production was trending downward. Specifically, Mr. Libersat was asked about whether he had taken into consideration interference from Well No. 4, when he was created the decline curve for Well No.3, as well as whether he had allocated too much production to Well No. 4, in light of the test meter reading discrepancies. In response, Mr. Libersat testified he hadn't conducted well pressure interference tests and he believed they have done the best they could.

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[9] *See* Exhs. 16 and 17.

[10] *See* Whiting Cross Exh. 3 - Proration schedule dated 2/1/13.

[11] V. I, pp. 184-86.

Mr. Libersat was also questioned about identifying the method of allocation used by Brown was based on W-10's on both P-17's filed with the Commission. In response, Mr. Libersat explained there was no other method of allocation to check on the P-17 form. He also explained that while he understood W-10's would be conducted on a monthly basis on Well No. 3, the last time a W-10 had actually been reported as conducted was October 2007.[12] Further, Mr. Libersat admitted despite Brown's indication on Exh. 13 (Form P-17), allocation actually was based on W-10 data, there is no current W-10 data and instead, allocation has been based on Brown's deduct method.

Further, Mr. Libersat explained that during various times actual allocation of production from the wells was difficult to determine. At times Well No. 3 was allocated no production due to mechanical problems at the well and at other times there were problems with the separator head, which on at least one occasion, prevented actual allocation assigned to Well No. 5. Mr. Libersat also explained that he tried to rectify the errors in the metering equipment by alternating which well was directed through to the faulty meter. By alternating the wells through the faulty meter, he reasoned the erroneous readings on one well would eventually be shared and mitigated to the other well. In order to assure this method worked effectively, Brown tried to put each well on test approximately the same number of days. Mr. Libersat acknowledged Brown's allocation, given the problems with the erroneous meter readings, wasn't very accurate on a daily basis, but over a period of time, he believed the allocation to be reasonably accurate. Mr. Libersat believed he fairly and reasonably allocated production given his experience and the numbers he had to work with.

Testimony of Don Rhodes

Brown's second witness was Mr. Don Rhodes, an independent regulatory consultant hired by Brown to testify regarding his familiarity with Statewide Rules 26 and 27, as well as general Commission policy and procedure. Firstly, Mr. Rhodes was unable to identify an instance in which the Commission granted a Rule 26 exception when a working interest owner went non-consent. In his opinion, Brown did not need to file for a Rule 26 exception as a result of Brock and Whiting's going non-consent in Well No. 4 because there was only one lease at issue, with the same royalty owners, in the same field. He added "under normal conditions Rule 26 and 27 doesn't apply." He later clarified there was no way of indicating on the Rule 26 exception application (Form P-17) how or why the royalty or working interests were not the same. But he believes an applicant could make a notation on the form to indicate a non-consent owner. While Mr. Rhodes had someone research whether other Form P-17's filed with the Commission had such a non-consent notation, no such forms were found.

Mr. Rhodes testified Mr. Libersat's "deduct" allocation method is a fair and reasonable method of allocating production. He later agreed Brown's deduct method is also fair and reasonable so long as the measurement used for the deductions itself is accurate.

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[12] Mr. Libersat stated Brown had conducted a test that "would essentially be considered a W-10 test" in July of 2012, but explained the test results were not filed with the Commission. V. I, p. 190.

PROTESTANT'S EVIDENCE

Motion to Dismiss

In response to Brown's Motion to Dismiss, Protestants Brock and Whiting assert Brown's Rule 26 application was properly filed and the docket should not be dismissed. Brock and Whiting presented evidence for their opposition to the motion to dismiss along side their evidence in support of their case in chief on the merits of the Rule 26 exception.

Merits - Rule 26/27 Exception

Brock and Whiting contend for the period in which they are non-consent parties to Well No. 4 they hold no interest or ownership in the well; therefore, Brown's application for an exception to Rule 26 should be approved. While all three wells (3, 4, and 5) originated from the same original lease, during and until the provisions of the Non-Consent penalty payout have been met, the ownership interest in Well No. 4 is different from that of Well Nos. 3 and 5.

Testimony of Ms. Brock

The Protestants' direct case in protest of Brown's Rule 26 application began with Ms. Michelle Brock, the landman for G.W. Brock. Ms. Brock has worked for G.W. Brock for over 31 years. In discussing Brock's relationship with Brown, Ms. Brock testified that she repeatedly asked Brown for production information such as production reports, daily reports of oil and gas and water production for Well Nos. 3 and 4, as well as an explanation of how Brown was measuring and separating production for the two wells.[13] Ms. Brock's characterized Brown's cooperation in releasing some of this information as being neither cooperative nor accommodating, noting that Brown did not turn over the Weekly Gauge Reports (Brown Exh. 11) until after Brock and Whiting filed its complaint with the Commission and in response to a Request For Production.

Ms. Brock further explained that Brock's purpose in filing its complaint against Brown was to insure the protection of its correlative rights because they do not believe Brown should be commingling production for Well Nos. 3 and 4 given the different working interests in the two wells. In conjunction with the lack of responsiveness from Brown to their requests for information as well as Brock's belief that commingling production from the two wells fails to protect correlative rights, Ms. Brock testified as to the necessity of the Rule 26 hearing. She further testified that while in the 31-years working in the oil fields she had never been a party to a situation in which a non-consent owner had to go to the Railroad Commission for a Rule 26 exception, she believe it necessary in this case.

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[13] V. II, p. 9, ln. 11-20.

In discussing Brock's interest in the wells, Ms. Brock testified that Brock currently held no interest in Well No. 4, but did hold a 10 % working interest in Well No. 3. While Brock initially participated in the drilling of Well No. 4, after a review of the information obtained during drilling, Mr. Brock did not believe the well would be economically successful and therefore elected to go non-consent. However, because Brock has a 10 % interest in Well No. 3, Brown's accuracy in accounting for production in Well Nos. 3 and 4 is important to Brock. Brock notes that Brown accurately identified the working interests in Well Nos. 3 and 4 in the pending P-17 application (Brown Exh. 17). The pending P-17 application filed by Brown reflects Brock currently holds no interest in Well No 4 and a 10 % in Well No. 3.

Ms. Brock testified that the JOA governs non-consent penalties, as well as the general accounting procedure. As explained by Ms. Brock, the non-consent provisions of the JOA, after the consenting working interest owners recover 300% of the non-consent share of expenses with the well, and a 100% penalty is paid by the non-consenting parties, the non-consenting working interest owners (i.e., Brock and Whiting) would again have a working interest in Well No. 4. Further, Ms. Brock explained while the JOA governs accounting of production and requires accurate accounting, she contends the Commission hearing is proper because Brown commingled production from wells that were drilling under the JOA. She reasoned that because the JOA states what obligations Brown is to perform as an operator, and because the Commission has jurisdiction over Brown has an operator, the Commission has jurisdiction over Brown's's performance of their duties outlined in the JOA. Ms. Brock contends because Brown was not in compliance with the Commission's rules for operations, the Commission should act.

Ms. Brock testified that the change in working interest in Well No. 4 were not filed or recorded in the county records by neither party. She explained while such non-consent provisions of Joint Operating Agreements change ownership of working interests in a well, such documents are not traditionally filed in the courthouse to document such a change in ownership.

Additionally, because of Brock and Whiting's exercise of the non-consent provision of the JOA, Ms. Brock believes a new and separate lease should be created due to the different working interests in the wells and production from Well Nos. 3 and 4 should not be commingled. Brock maintained that even if the duration of the non-consent interest is temporary due to quick payment of the non-consent penalty, accurate accounting of the two wells is important to protecting correlative rights of the different working interests.

Testimony of Mr. Lowder

Testifying on behalf of Protestant Whiting was Mr. Jack Lowder, a petroleum engineer since 1979 and an employee of Whiting since April 2011. The bulk of Mr. Lowder's testimony went through and discussed what Protestants' contend reflect Brown's errors in operations and allocation of production from Well Nos. 3 and 4. Mr. Lowder's review included testimony regarding Brown's payout status reports and Mr. Libersat's allocation methodology and techniques, as well as issues with inaccurate measurements by the facility's metering, testing and separating devices. Specifically,

Mr. Lowder sponsored numerous exhibits and presented testimony outlining the various inaccuracies in Brown's measurement, operation, and allocation of production for wells.

Lowder's exhibits detailed and documented the inaccuracies in measuring and allocating production for the two wells from January 2012 (when Well No. 4 first started producing) to December 2012. Specifically, Mr. Lowder testified in support of Whiting's Exhibit 9-R, which documented a comparison of the weekly gauge reports summary to the Brown allocation summary. For example, test meter readings and tank gauge readings for the J.W. Morrison lease facility during January 20 to 31, as documented by Brown were consistently off for the first ten-days after Well No. 4 was put into production. In January 2012, the ratio of the test meter versus the tank gauge readings was 1.503%, indicating that the meter read 50.3% higher than the tank gauge reading. In April 2012, the ratio of the test meter versus the tank gauge reading was 1.1277%, indicating that the test meter read 12.7% higher than the tank gage reading. In July 2012, the ratio of the test meter versus the tank gauge reading was 1.346%, indicating that the test meter read 34.6% higher than the tank gage reading. In August 2012, the ratio of the test meter versus the tank gauge reading was 1.806%, indicating that the test meter read 80.6% higher than the tank gage reading. In September 2012, the ratio of the test meter versus the tank gauge reading was 2.600%, indicating that the test meter read 160.00% higher than the tank gage reading. In November 2012, the ratio of the test meter versus the tank gauge reading was 1.280%, indicating that the test meter read 28.0% higher than the tank gage reading. Mr. Lowder stressed that in order to assure accurate allocation, gauge reports should closely reflect the actual sales volume thereby protecting the correlative rights of all parties.

Despite the frequent inaccurate test meter gauge readings and tank gauge readings, Brown based allocation on the tank gauge readings, which at times attributed inaccurate allocation. On a few occasions, allocation reported by Brown was attributed to a well that was down or otherwise off line--- in 2012, this happened on June 16, 25, and 27; and August 17.[14]

Lowder also testified as to the number of days the wells were placed "on test" during 2012. A review of Brown's weekly gauge reports indicate from January 19, 2012 to October 16, 2012, Well No. 3 was on test for about 45% of the time and Well No. 4 was on test for 55% of the time. Mr. Lowder testified that given the inaccuracies in the test meter and tank gauge, he believes the better engineering practice would have been to assure that the wells were placed on test an equal amount of time. Having the two wells put on test an equal number of days would have been a simple matter of changing a few valves. Yet, no adjustment was made to the well on-test configuration during the first three months of Well No. 4 going on-line when usually the highest production rate occurs.

Mechanical issues with Well No. 3 being down often were also discussed in detail by Mr. Lowder. Specifically, Mr. Lowder testified that at times, Well No. 3 was down seven times more often than Well No. 4. Further, while Well No. 3 being down so often (63 days over a 10-month period) was arguably to the advantage of Well No. 4, Lowder contends a reasonable operator should

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[14] *See* Exh. Whiting 9-R; and Brown Exhs. 11 and 12.

have taken steps to assure the protection of all correlative rights.

Lowder then testified as to the Protestants' proposed method of meter proving, to assure against further metering inaccuracies. As a result of the errors and inaccuracies detailed by Mr. Lowder's testimony and sponsored exhibits, Whiting recommended a meter proving procedure to be followed by Brown. (Exh. 15-R). Whiting's procedure consisted of five main steps, which both Whiting and Brock agree would assure a more accurate method of metering, measuring, and allocation of production from the J.W. Morrison lease. This procedure would require a new test separator to be hooked up to Well No. 4 until the non-consent penalty payment has been met. Mr. Lowder testified that having a new and independent separator hooked up to Well No. 4 assures a more accurate allocation of Well No. 4's production, thereby protecting the correlative rights of all parties. The possibility of a separate production facility dedicated to Well No.4 was raised with an estimate of costs to be between $80,000 and $100,000, and was not recommended by Mr. Lowder given the high cost. Mr. Lowder gave a ball park estimate of installing a separate test separator for Well No. 4, to be approximately $25,000.

Lowder next presented testimony in support of the Protestants' proposed method of calculating how production from the lease should have been allocated. Whiting's proposed allocation method relies upon a decline curve analysis. (Exh.16). Mr. Lowder testified in detail about various methods of allocation that could be used taking into consideration the number of down days for Well No. 3 and 4. Whiting Exhibit 20 is a series of hypothetical representations which outline and chart nine different production graphs, which graphs production allocation using a decline curve with zero, 4, 10, 20, 30, 40, 50 and 60 down days accounted for in the graphing. Whiting Exhibits 21 and 22 graph the decline curve allocation calculation in which 10 down days are prorated across from January 2012 to September 2012, and then in Exh. 22, the 10 down days were assumed to have occurred just in August 2012. These two exhibits, along with Exhibit 19, were presented as a way of demonstrating how Whiting's decline curve allocation would work given various scenarios. In the end, the decline curve allocation methodology indicates that subtracting the down time off of the decline curve allocation effectively effects the overall allocation very little. Given the lack of separate and continuous metering of Well Nos. 3 and 4, Mr. Lowder asserted that the Protestants' proposed decline curve allocation is the best way to allocate production between the two wells.

EXAMINERS' OPINION AND DISCUSSION

Motion to Dismiss

The examiner is of the opinion that Brown's Motion to Dismiss should be granted, in part and denied, in part. For the reasons outlined below, Brown's Motion to Dismiss Brock and Whiting's complaint is granted and Brown's Motion to Dismiss their SWR 26 application is denied.

Merits - Rule 26/27 Exception

This is a hearing of first impression in determining whether SWR 26 commingling authority should be granted when mineral interest owners decide to go non-consent in the further development and operations of a well, in which the mineral interest owners also own mineral interests in other wells on the original lease. Given the unusual facts reflected in thie testimony and the evidence presented, the hearings examiners are of the opinion that the Commingling Permit remain in effect.

Commingling authority is proper here because there are separate leases (as designated by Brown) and the production off the different leases must be properly allocated according to Commission rules. The original Forms P-17 and P-6 filed by George R. Brown stated there were differing ownership interests, and therefore differing tracts -- a prerequisite of SWR 26. Brown submitted an amended P-6 in December 2012 and designated two separate leases. Brown's submitted form P-17 also indicated different mineral interest ownership in the wells by marking the corresponding box under Section 4 of the P-17 and again in the attached "Break Down of Working Interest" for Well Nos. 3 and 4, which listed the identity of the royalty owners and their percentage of ownership.[15] Brown voluntarily designated two separate regulatory leases. It appears only after the hearings commenced did Brown no longer intend to have two separate leases.[16]

SWR 26 applies where there are "two or more tracts of land. . .". What distinguishes one tract of land from another tract of land is traditionally defined by the tract's ownership. Here, Brown designated two separate tracts of land when it filed the P-6 in December 2012 indicating different ownership interests in the two separate leases. Further, the Joint Operating Agreement (JOA) sets out the parameters and the requirements of when a mineral interest owner decides to go non-consent on a well. Section 12 of the JOA states: "[u]pon commencement of operations for the drilling, . . ., each Non-Consenting Party shall be deemed to have relinquished to Consenting Parties, and the Consenting Parties shall own and be entitled to receive, . . ., all of such Non-Consenting Party's interest in the well, its leasehold operating rights, and share of production. . . " until the Non-Consent

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[15] Exh. 17.

[16] *See* Exh. 21--Brown's P-6 form filed on 2/2/13, which stated: "This Request to Consolidate is to re-consolidate leases incorrectly subdivided by Form P-6 dated August 17, 2012."

penalty payout has been fulfilled. The terms of the JOA dictates that as a result of deciding to opt-out of a well, a Non-Consent party relinquishes ***to the Consenting party, all interest in the well***, leasehold operating rights, and their share of production in the well until the non-consent penalty payout has been met.

Under a similar scenario where there are non-consenting parties opting out of a well, commingling authority is usually not required because measurement and allocation of production are generally regulated under the terms of a JOA or otherwise resolved between the parties. Nonetheless, here, because Brown voluntarily created a separate regulatory lease and filed an application for a Rule 26, Brown's SWR 26 application should be granted. Given the parties' inability to come to an agreement on the operation, measurement and allocation, commingling authority is not only appropriate, but appears necessary to rectify past and on-going errors in the manner in which the facility measures production. Only by granting Rule 26 commingling authority will the rights of all interest owners in the two different regulatory leases will be adequately protected, as mandated by SWR 26.

Brown contends that resolution of past measurement errors and the resulting misallocation of production are solely issues that fall within the terms of the JOA which controls resolution of accounting disputes. Conversely, Protestants assert because Rule 26 allows the Commission to approve a proposed allocation method the allocation method proposed by Protestants can be and should be applied retroactively. The hearings examiner is of the opinion that resolution of past errors in Brown's measurement and allocation is outside of the jurisdiction of the Commission. While the Commission has authority to determine whether a SWR 26 proposed method of allocation "accurately attributes to each interest its fair share of aggregated production," nowhere in the Statewide Rules, nor statutes, does the Commission have the authority to rectify past errors in measuring and allocating production. Rectifying past disputes over allocation is neither an express nor implied power conferred upon the Commission. And although the Commission has the express authority with respect to the regulation of production and distribution of minerals, as well as "whatever powers reasonably necessary to fulfill its express functions or duties,"[17] the Commission would be acting outside of its jurisdiction should it approve Protestants' proposed retroactive allocation.

Additionally, the hearings examiners are of the opinion that going forward, the method which best and "accurately attributes to each interest its fair share of aggregated production" as required under SWR 26(b)(3), is the allocation method proposed by Protestants. Given the past history of inconsistences in the metering of production from the wells, Protestants' meter proving method proposed (Protestants' Exh. 15R) appears to ensure adequate measurement of production from the wells.

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[17] *See Seagull Energy E&P, Inc. v. Railroad Com'n of Texas*, 99 S.W.3d 232 (Tex.App.--Austin 2003), order withdrawn, (July 2, 2004) and judgment aff'd, 226 S.W.3d 383 (Tex. 2007).

FINDINGS OF FACT

1. Notice of this hearing was given to all affected persons at least ten days prior to the date of hearing.

2. In late 2011, Whiting Oil & Gas Corporation and G.W. Brock opted to go Non-Consent in the further completion and operation of Well No. 4 of the J.W. Morrison Lease (61687), Lyn-Kay (6200) Field, Kent County, Texas, as provided under the terms of the Joint Operating Agreement.

   a. As Non-Consent parties to Well No. 4, Brock and Whiting have no working interest ownership in the well;

   b. Brock has a 10% working interest ownership in Well Nos. 3 and 5; and

   c. Whiting has a 25% working interest ownership in Well Nos. 3 and 5.

3. On three separate occasions Brown filed Form P-17 seeking an exception to SWR 26 for the J.W. Morrison Lease (61687), Lyn-Kay (6200) Field, Kent County, Texas.

   a. On August 17, 2012, Brown sought an exception to SWR 26 for the J.W. Morrison Lease, Well Nos. 3 and 4, Lyn-Kay (6200) Field, Kent County, Texas;

   b. On December 14, 2012, Brown filed amended P-6 application, to include the newly drilled Well No. 5 to the application for an exception; and

   c. On February 25, 2013, Brown filed an amended P-6 "conditionally" seeking an exception to SWR 26 for the J.W. Morrison Lease, Well Nos. 3, 4, and 5, Lyn-Kay (6200) Field, Kent County, Texas

4. On three separate occasions Brown filed a Form P-6:

   a. On August 17, 2012, Brown sought permission to subdivide an oil lease for the J.W. Morrison Lease, Well Nos. 3 and 4, Lyn-Kay (6200) Field, Kent County, Texas;

   b. On December 12, 2012, Brown sought permission to subdivide an oil lease for the J.W. Morrison Lease, and added the newly drilled Well No. 5; and

   c. On February 25, 2013, Brown sought permission to re-consolidate the J.W. Morrison Lease (61687), containing Well Nos. 3. and 5; and the J.W. Morrison "A" Lease (69907), containing Well No. 4.

5. Well No. 4 of the J.W. Morrison Lease (61687), Lyn-Kay (6200) Field, Kent County, Texas, was completed in January 2012.

6. Whiting Oil & Gas Corporation and G.W. Brock filed protests of Brown's original August 17, 2012, P-17 filing.

7. The Commission assigned a new lease number (69907) for the J.W. Morrison "A"Lease, after the August 17, 2012 filings. The J.W. Morrison "A" Lease contains Well No. 4 from the original J.W. Morrison Lease (61687).

8. During all times relevant Brown operated Well Nos. 3 and 5 on the J.W. Morrison Lease (61687).

9. During all times relevant Brown operated Well No. 4 on the J.W. Morrison Lease (61687); as well as the same well on the latter-designated J.W. Morrison "A" Lease (69907).

10. From January 12, 2012, until October 2012, production from Wells No. 3 and 4 was measured using reading from the test separator and the tank gauge located on the facility. Production was allocated between the two wells using a "deduct" method, in which a well's production was calculated by deducting the test separator measurement reading from the tank gauge reading.

11. From January 2012, to October 2012, there were numerous discrepancies and erroneous readings coming off the test separator.

    a. In January 2012, the ratio of the test meter versus the tank gauge readings was 1.503%, indicating that the meter read 50.3% higher than the tank gauge reading.

    b. In April 2012, the ratio of the test meter versus the tank gauge reading was 1.1277%, indicating that the test meter read 12.7% higher than the tank gage reading.

    c. In July 2012, the ratio of the test meter versus the tank gauge reading was 1.346%, indicating that the test meter read 34.6% higher than the tank gage reading.

    d. In August 2012, the ratio of the test meter versus the tank gauge reading was 1.806%, indicating that the test meter read 80.6% higher than the tank gage reading.

e. In September 2012, the ratio of the test meter versus the tank gauge reading was 2.600%, indicating that the test meter read 160.00% higher than the tank gage reading.

f. In November 2012, the ratio of the test meter versus the tank gauge reading was 1.280%, indicating that the test meter read 28.0% higher than the tank gage reading.

CONCLUSIONS OF LAW

1. Proper notice was issued as required by all applicable codes and regulatory statutes.

2. All things have occurred and been accomplished to give the Commission jurisdiction to decide this matter.

3. As Non-Consent parties, Brock and Whiting relinquished to the Consenting parties, all interest in the Well No. 4; including, their leasehold operating rights, and their share of production in the well until the non-consent penalty payout has been paid out.

4. Brown voluntarily subdivided the J.W. Morrison Lease, creating a new regulatory J.W. Morrison A Lease containing Well No. 4 by filing and obtaining approval of a Form P-6, effective February 1, 2012.

5. The working interest ownership in Well No. 4 on the J.W. Morrison "A" Lease (69907) and Well Nos. 3 and 5 on J.W. Morrison Lease (61687), are not the same; and therefore, do not have identical working interests.

6. Pursuant to SWR 26, and in order to protect correlative rights, the Commission approves of commingling of the oil, gas, or oil and gas production from Well No. 4 on the J.W. Morrison "A" Lease (69907) and Well Nos. 3 and 5 on J.W. Morrison Lease (61687), which produce from the same commission-designated reservoir.

7. Under SWR 26, the Commission does not have jurisdiction to adjudicate or otherwise resolve disputes involving past discrepancies in production measurement and/or allocation.

8. Pursuant to SWR 26(b)(3) Protestants' proposed method of allocation will best and more accurately attribute to each interest in the subject wells their fair share of aggregated production.

EXAMINERS' RECOMMENDATIONS

The examiners recommend the George R. Brown Partnership, L.P.'s Motion to Dismiss its application for a surface commingling authority be DENIED and its Motion to Dismiss the Complaint of G.W. Brock and Whiting Oil and Gas Corporation be GRANTED.

Further, the examiners recommend Brown's Rule 26 Commingling Permit be APPROVED and as special conditions to this authority, the examiners recommend the George R. Brown Partnership, L.P. must:

1. Monthly isolate and separately measure production from Well No. 4 on the J.W. Morrison "A" Lease (69907), Lyn-Kay (6200) Field, Kent County, Texas; and

2. Allocate total production by using the metered volumes from Well No. 4 on the J.W. Morrison "A" Lease (69907), Lyn-Kay (6200) Field, Kent County, Texas and Well Nos. 3 and 5 on J.W. Morrison Lease (61687), Lyn-Kay (6200) Field, Kent County, Texas.

Based on the record in this case, the examiner further recommends adoption of the above-listed Findings of Fact and Conclusions of Law.

Respectfully submitted,

Laura E. Miles-Valdez
Legal Examiner

Richard Atkins, P.E.
Technical Examiner